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IN THE

Supreme Court of the United States

OCTOBER TERM — 1945

No. 1143

WALTER P. GARDNER, Trustee of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

A Debtor-Petitioner,

vs.

THE STATE OF NEW JERSEY,

A Creditor.

PETITION FOR RECONSIDERATION OF TRUSTEE'S PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable Justices of the Supreme Court of the United States:

The petition of WALTER P. GARDNER, surviving trustee of The Central Railroad Company of New Jersey, a debtor corporation in bankruptcy under Section 77 of the Bankruptcy Act, for a reconsideration of the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, which was denied by the Court on May 20, 1946, respectfully shows and charges as follows:

First: **This case involves important questions of Federal law which have not been, but should be, settled by this Court.**

The petitioning railroad being one of the Trunk Line carriers serving the Port of New York constitutes a vital part of the national transportation system. It has been in reorganization under Section 77 of the Bankruptcy Act for over six years. The chief claimants against the Debtor's Estate are the State of New Jersey and the First Mortgage Bondholders, both of whom have filed proofs of claim in the Debtor's reorganization proceedings, and both assert liens as security for said claims, which liens are conflicting.

In this situation the Trustees of the Debtor's Estate, notwithstanding the most assiduous and continuous efforts during the past six years, have been unable to secure a judicial determination as to the extent and priority of the aforesaid liens, and the surviving Trustee is now confronted by a decision of the Third Circuit Court of Appeals which purports to follow the decision of this Court in *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132, and which, based upon said Court's construction of that decision, excludes from the jurisdiction of the Bankruptcy Court any questions regarding a railroad debtor's liability for State taxes, except those involving (1) mathematical error in computation or (2) legal error in the tax assessment. Such a construction of the bankruptcy power precludes any judicial determination as to either the extent or the priority of the tax liens now asserted by the State of New Jersey against the Debtor's Estate, and creates an insuperable barrier to any progress in the Debtor's reorganization.

A controlling reason why this case merits review by this Honorable Court is that the stalemate above described appears to be directly traceable to the uncertainty that has arisen as the result of the decision of this Court in the Arkansas Commission case respecting the

scope of the bankruptcy jurisdiction in dealing with State tax claims. Respecting this uncertainty, Collier, in his 14th Edition of his work relating to Bankruptcy, Volume 3, page 2164, after quoting extensively from the Arkansas Commission decision, has this to say:

> "The effect of this decision upon the former doctrines concerning the Bankruptcy Court's power to determine the amount and legality of taxes is obviously far-reaching. Yet the full extent of this effect is somewhat in doubt."

In a footnote at the bottom of page 2166, the same work, he says:

> "It is regrettable that the Supreme Court took such an inapt case as the occasion to express its views as to the second proviso of Section 64 A 4 under the fact situation and in the light of the propositions previously set forth herein the decision is not directly in point on the problem of pre-bankruptcy assessments by tax officials, assessors and the like."

Since the Arkansas decision did not involve any question as to the extent or priority of liens or the application of Section 67 b and c to railroads in reorganization under Section 77, it seems doubtful that this Court intended to pass upon such matters; but the fact is that the Third Circuit Court of Appeals in the present case has so construed said decision as to deprive the Bankruptcy Court of the jurisdiction if had asserted to deal with such questions. The result is that unless the lower court's decision is reviewed, and this Court's decision in the Arkansas case is clarified, the petitioner can see no basis on which a plan for reorganizing the Debtor under Section 77 can be devised. It is apparent that if the true meaning of Section 77 is not clarified, the practical working of the whole Congressional Plan for railroad reorganization will be defeated.

Second: **The Third Circuit Court of Appeals in this case has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals.**

The lower court set aside an order of the Bankruptcy Court asserting jurisdiction to pass upon the extent and priority of the tax liens asserted by the State of New Jersey, basing its decision on the ground that "the only matters left open for the Bankruptcy Court to pass upon are: 1. mathematical error in the computation of the amount of the tax or legal error in its assessment." In this respect the decision of said Court appears to be in direct conflict with the decision of the Second Circuit Court of Appeals in *Lyford* v. *New York*, 140 Fed. 2nd 840, wherein it was held that a Bankruptcy Court in administering Section 77 does have jurisdiction to pass upon the extent and priority of State tax claims.

The importance of this question as to the extent and priority of tax liens from the standpoint of the administration of Section 77 generally will be apparent from the fact that if the decision of the Third Circuit Court in the present case stands, it will mean that the extent and priority of a State's tax lien against a railroad in reorganization will be determined by the mere claim of the State as filed in the proceeding and without any adjudication thereof by the Reorganization Court. This necessarily results because there has been no hearing or adjudication of any kind in any court as to the extent and priority of the liens involved.

Third: **The Third Circuit Court of Appeals, in dealing with the Bankruptcy Court's action respecting a compromise of the State's tax claim, has so limited the Bankruptcy Court's jurisdiction as to deprive the Debtor of rights acquired under applicable local decisions.**

A major question that must be settled is whether the very large tax claim which the State of New Jersey filed in the Debtor's reorganization proceeding has been either compromised or modified by intervening equities which have arisen as the result of action taken by the Trustees under the direction of the Bankruptcy Court in the effort to accept the offer contained in a regularly enacted statute of the State of New Jersey, which statute, subsequent to the Trustees' action, was held unconstitutional in a proceeding to which neither the Debtor nor the Trustees were parties.

The Third Circuit Court of Appeals in *In re Central Railroad Company of New Jersey,* 136 Fed. (2d) 633 (Cert. den. in *Pitney et al.* v. *State of New Jersey,* 320 U. S. 805, No. 534, October Term 1943) held that the order of the Bankruptcy Court directing the Trustees to accept said offer of compromise was in part invalid, but the question as to what rights or equities the Debtor's Estate might have acquired as the result of the Trustees' bona fide effort to accept the State's offer of compromise was not in issue and was not decided. (State's Brief, pp. 8, 9, 13, 14, 18 in *Pitney* v. *State of New Jersey,* 320 U. S. 805.) Furthermore, that question was not in issue in the proceeding before the Third Circuit Court which is the subject of this petition. The decision of that Court here involved, however, by its terms excludes consideration of that question from the jurisdiction of the Bankruptcy Court. In this respect, said decision is highly prejudicial, since under the law of New Jersey it is settled that a statute held unconstitutional is not necessarily void ab initio, *Allison* v. *Corker,* 67 N. J. L. 596; *Lang* v.

Bayonne, 74 N. J. L. 455; *Attorney General* v. *McGuinness*, 78 N. J. L. 346; *Eastwood* v. *Russell*, 81 N. J. L. 672; *In re Public Utility Board*, 83 N. J. L. 303, and by the decision of this Court in *Chico County Drainage District* v. *Baxter State Bank*, 308 U. S. 371-374. The Debtor's Estate is entitled to a judicial determination as to whether it has not acquired rights or equities as the result of its acceptance of the offer of compromise, while it was a valid and subsisting offer notwithstanding a subsequent determination that the statute containing said offer was, as to certain parties, unconstitutional.

Fourth: **The very unusual developments since our original petition for a writ of certiorari was filed call for a reconsideration thereof.**

The original petition for a writ of certiorari was filed on April 18, 1946. In the State's "Brief in Opposition to Petition for Writ of Certiorari" (p. 4) it is stated that:

> "The Trustee since the filing of present petition for certiorari has made a substantial part payment on the tax debt, reserving all rights to continue litigation."

In order that this Court may be accurately informed respecting the significance of this payment, we attach hereto Order No. 333 of the Reorganization Court authorizing the payment on conditions approved by the Attorney-General of the State of New Jersey. The Court's attention is invited to the fact that this large cash payment was made by the Trustee with the consent of the State, subject to the express proviso that the application of the payment might become subject to final determination by the Reorganization Court, although in the absence of a review of the Third Circuit Court's decision by this Court, the jurisdiction of the Reorganization Court in the premises will be wholly uncertain.

If the payment in question is ultimately determined to apply in discharging the principal of taxes claimed by the State and interest at 3% per annum to date of payment, then the balance of the State's claim, amounting to over Sixteen Million Dollars, will represent only penalties claimed at 1% per month.

WHEREFORE, your petitioner prays that the Court reconsider our petition that a writ of certiorari may issue out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be determined, the full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case, to the end that the case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may be proper.

Dated, May 21, 1946.

WALTER P. GARDNER,
Surviving Trustee of The Central Railroad Company of New Jersey, The Debtor,

By JAMES D. CARPENTER, JR.,
HOWARD L. KERN,
ALEXANDER H. ELDER,
Attorneys for Petitioner,
75 Montgomery Street,
Jersey City 2, New Jersey.

CERTIFICATE OF COUNSEL

I, JAMES D. CARPENTER, JR., attorney appointed by the District Court for Walter P. Gardner, Trustee of The Central Railroad Company of New Jersey, do hereby certify that the foregoing petition is filed in good faith and not for delay.

Dated, May 21, 1946.

JAMES D. CARPENTER, JR.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Debtor.*	In Proceedings for the Reorganization of a Railroad. No. 29,778.

Order No. 333 Authorizing and Directing Trustee to Make Payment on Account of Taxes Claimed by State of New Jersey

This cause coming on to be heard pursuant to order entered herein on April 16, 1946, and it appearing to the Court that due notice of said order and of the hearing thereon has been served as said order directed and the Court having reviewed the record and having heard the parties and being fully advised in the premises, it is

ORDERED, ADJUDGED and DECREED:

1. The Trustee is hereby authorized and directed to pay to the State of New Jersey within 10 days the sum of $15,250,000.00 in cash on account of tax claims of the State of New Jersey for the years 1932 to 1940, inclusive, including interest thereon, if any, said payment to be made upon the following conditions, to which the State of New Jersey, by acceptance of said payment, shall be deemed to have expressly assented:

(a) in the event that the claims of the State of New Jersey shall be finally determined to be an

amount greater than said payment, said payment shall be deemed to have been applied in satisfaction of said claims, as finally determined, for each of the years commencing with 1940 and extending back through each of the preceding years and portion thereof that said payment shall be sufficient therefor, *provided* that with respect to any year for which such payment shall be sufficient to satisfy only a portion of the claim the application shall be deemed to have been made ratably as between the principal amount of the tax and the interest thereon, at the rate finally determined, computed to the date of said payment; and provided further, that if it shall be finally determined that this Court may direct the application of said payment solely to the satisfaction of the principal amount of said claims, the application of said payment shall be deemed to have been made solely in satisfaction of said principal amount;

(b) in the event that the claims of the State of New Jersey shall be finally determined to be an amount less than said payment, the amount of such overpayment shall be credited by the Treasurer of the State of New Jersey upon the taxes next legally levied and payable to the State of New Jersey, subsequent to such determination, by the Trustee or the Debtor or any successor in title to substantially all of the properties of the Debtor located in the State of New Jersey;

(c) in making said payment the Trustee may, in his discretion, use the funds represented by certified checks in the aggregate amount of $3,577,689.52 payable to the Treasurer of the State of New Jersey, and tendered to said Treasurer pursuant to Orders Nos. 123, 163, 178 and 216 entered

herein, and for that purpose may regain possession of and surrender said checks for cancellation, without prejudice to effectiveness of said tenders or any other tenders or the legal consequences that may be found to have ensued therefrom.

2. Except as otherwise provided in paragraph 1 of this order, the making of said payment by the Trustee and the acceptance thereof by the State of New Jersey shall be without prejudice to the rights of or the positions asserted by either of them or any party hereto in litigation now or hereafter pending relating to said claims of the State of New Jersey.

GUY L. FAKE
United States District Judge

Dated: April 26th, 1946.

The making and entry of the
foregoing order is hereby approved.

WALTER D. VANRIPER
Attorney General
of New Jersey
by Benj. C. Van Tine
Deputy Attorney General